UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF MAINE, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF NEW HAMPSHIRE, STATE OF NEW JERSEY, STATE OF RHODE ISLAND, AND STATE OF VERMONT, Petitioners, v. ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	**EMERGENCY MOTION FOR STAY** **RULING SOUGHT BY MARCH 3, 2003**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Petitioner, v. ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	Docket No. 02-1387/ Docket No. 03-1016 (consolidated cases)

Petitioners New York, Connecticut, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Rhode Island, and Vermont ("Petitioning States") respectfully request that this Court stay EPA's New Source Review rule, 67 Fed. Reg. 80185-80289 (Dec. 31, 2002) (attached as Exhibit A, hereinafter "NSR Rule" or "Rule") before it takes effect on March 3, 2003. A stay pending review of the Rule's validity is necessary to prevent irreparable harm to public health and the environment and to avoid the immediate burdens imposed upon the Petitioning States' air programs.

For twenty-five years, New Source Review (NSR) has been a cornerstone of state efforts to reduce air pollution from older, industrial sources. By treating existing sources of air pollution

that upgrade their facilities as a "new source," subject to permitting and pollution control requirements, NSR forces dirtier facilities to reduce their emissions or retire. The NSR Rule replaces this statutory mandate and a well-established regulatory program with a self-policing scheme that raises the threshold for triggering NSR requirements, enabling many existing sources to upgrade their facilities without installing modern pollution controls. The Rule's lax interpretation of the Act's "modification" provision, 42 U.S.C. § 7411(a)(4), which triggers NSR permitting and pollution control requirements for existing sources, violates both the letter and spirit of the Act, and is in direct contravention of this Court's seminal decision in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). Not only is the NSR Rule likely to cause air quality degradation, but Petitioning States will be forced – absent a stay – to immediately divert scarce resources from air programs with proven environmental benefits to meet EPA's unreasonable schedule for implementation. In view of the questionable legality of the Rule and the irreparable harm that will result from further degradation of air quality and the unnecessary burden, a stay pending review of the Rule is warranted.

BACKGROUND

Enacted as part of the 1977 Amendments to Clean Air Act, NSR requires that all new major stationary sources undergo permitting and meet pollution control requirements. Existing major stationary sources that predated NSR were generally exempted from these requirements unless they significantly modify their operations. Specifically, NSR requirements for existing sources are triggered if the source undertakes a "modification," defined as:

> any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

42 U.S.C. § 7411(a)(4). This requirement ensures that existing stationary sources are not able to operate in perpetuity without installing pollution controls. *See Alabama Power*, 636 F.2d at 400.

The NSR provisions of the Act, including the modification provision, apply to sources located in areas already in attainment with ambient air quality standards, governed by the

Prevention of Significant Deterioration (PSD) requirements, *see* 42 U.S.C. § 7479(2)(C), and to sources located in nonattainment areas, which are subject to Nonattainment New Source Review (NNSR), *see* 42 U.S.C. § 7501(4). Sources in attainment areas that perform a modification triggering PSD requirements must obtain a preconstruction permit and implement the Best Available Control Technology (BACT). 42 U.S.C. § 7475. Sources in nonattainment areas that perform a modification must meet NNSR requirements, including obtaining a preconstruction permit, securing emission offsets, and implementing pollution controls to achieve the Lowest Achievable Emission Rate (LAER). 42 U.S.C. § 7503.

For more than two decades, EPA has construed the modification provision by establishing, for each NSR pollutant, a threshold level for an emission increase resulting from a physical or operational change necessary to trigger NSR requirements. *See* 45 Fed. Reg. 52707 (August 7, 1980) (codified at 40 C.F.R. § 52.21(b)(23)). This threshold is termed a "significant" net emissions increase, and modifications that meet this threshold are deemed "major modifications." *See* 40 C.F.R. §§ 52.21(b)(2) and (b)(23). The significance level for each NSR pollutant was determined by EPA in 1980, based on an analysis of *de minimis* air quality impacts. 45 Fed. Reg. at 52707-52708.

EPA issued a draft NSR Rule in 1996 "to provide States with greater flexibility to customize their own regulations implementing the NSR program." 61 Fed. Reg. 38250, 38251 (July 23, 1996) (attached as Exhibit B). The proposed reforms were also intended to "significantly reduce the number and types of activities at sources that would otherwise be subject to major NSR under the existing NSR program regulations" so as to reduce costs and regulatory burdens for industry. *Id.* EPA estimated that the changes, if finalized, would result in approximately 50 percent fewer sources being subject to PSD and NNSR requirements. *See id.* at 38319. Two years later, the Agency published a Notice of Availability (NOA), in which it presented its preliminary conclusions on certain aspects of the draft rule and requested additional public comment. *See* 63 Fed. Reg. 39857 (July 24, 1998) (attached as Exhibit C). EPA

concluded that several of the reforms proposed in 1996 required additional safeguards to protect the environment and ensure accountability on the part of industry. *See id.* at 39859-39862.

In June 2002, after completing a review of the NSR program directed by the President's National Energy Policy Development Group, EPA announced that it would finalize five elements of the draft rule: (1) a revised methodology for determining whether a change at a source will increase emissions significantly, and thereby be considered a "modification," (2) a new way to determine the emissions baseline used in measuring whether a significant emission increase will occur, (3) a plantwide applicability limit (PAL) permit that would allow a source to avoid triggering NSR requirements if it does not exceed an emissions cap, (4) an exclusion from NSR for any projects at a source designated as a "clean unit," and (5) an exclusion from NSR for changes that are classified as pollution control projects. *See* 67 Fed. Reg. at 80188.

EPA published the NSR Rule in the Federal Register on December 31, 2002. For the Petitioning States that implement the federal PSD regulations (Massachusetts, New Jersey,[1] New York, and Pennsylvania, the Rule is scheduled to go into effect on March 3, 2003, *see* 67 Fed. Reg. at 80186. The remaining Petitioning States, which have their own, EPA-approved, state programs to implement the Act's PSD requirements, have until March 3, 2006 to adopt the NSR Rule provisions as part of their SIPs, unless they can demonstrate to EPA that their program is as "stringent" as the NSR Rule. 67 Fed. Reg. at 80240-80241. All of the Petitioning States implement the NNSR requirements through their own, EPA-approved, programs, and therefore face the same 2006 deadline to implement the Rule's elements into their NNSR programs.

On December 31, nine of the Petitioning States filed a petition for review challenging the Rule. The tenth state, Pennsylvania, filed a petition for review on January 28, 2003, and on the following day, the Court consolidated the two petitions. On January 30, 2003, Petitioning States

[1] New Jersey has delegated source review authority of the federal PSD regulations.

asked EPA to grant, on or before February 5, a stay of the Rule pending judicial review.[2] The States also made EPA aware of the February 6 motion deadline in this case. *See* Request for Stay Pending Judicial Review (Jan. 30, 2003) (attached as Exhibit D). EPA did not respond to this request by February 5, prompting the filing of this motion.[3] Petitioning States seek a ruling on their motion by **March 3, 2003**, the effective date of the NSR Rule.

ARGUMENT

A stay is warranted in this case because Petitioning States demonstrate that (1) they are likely to succeed on the merits, (2) immediate and irreparable harm will occur absent a stay, (3) there is no harm to third parties if a stay is granted, and (4) a stay is in the public interest. *See Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Even if Petitioning States are unable to make a strong showing on all counts, the Court should find that the balance of interests weighs in favor of granting a stay. *See Cuomo v. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (a stay may be granted with a showing of "either a high probability of success and some injury, or vice versa"); *Serono Laboratories, Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998) (the factors "interrelate on a sliding scale and must be balanced against each other.") (citation and internal quotation marks omitted).

I. PETITIONING STATES ARE LIKELY TO SUCCEED ON THE MERITS.

Petitioning States are likely to succeed on the merits because (1) the new methodology for calculating emission increases is unenforceable and unsupported by the record, and (2) the

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[2] On January 31, Petitioning States also filed a petition for reconsideration with EPA. Pursuant to Section 307(d)(7)(B), the States filed this petition to preserve their ability to raise with the Court objections to the Rule which have arisen after the close of the public comment period in 1998. *See* 42 U.S.C. § 7607(d)(7)(B) (requiring that objections, the grounds for which arise after the public comment period, be submitted to the Agency in a reconsideration petition).

[3] Pursuant to Circuit Rule 27(f), Petitioning States have notified the Clerk's office and opposing counsel, Lois Godfrey Wye of the Department of Justice, of the filing of this motion.

emissions baseline, PAL, and clean unit exclusion regulations conflict with the Act's modification provision. In addition, the NSR Rule impermissibly allows regulated sources to take advantage of less stringent air pollution control requirements in violation of the Act's "anti-backsliding" prohibition.

A. The Emissions Methodology Is Not Enforceable or Supported by the Record.

EPA has unlawfully promulgated an emissions calculation methodology that contains elements that give existing sources unfettered discretion to determine whether NSR requirements apply to their projects. In addition to rendering the NSR program unenforceable, this approach contradicts EPA's own findings on the record.

First, the "actual-to-projected-actual" emissions methodology, which all existing sources may now use to determine whether a plant upgrade qualifies as a statutory "modification," includes an element that requires a source to ignore any emission increases that it attributes to "demand growth."[4] *See* 67 Fed. Reg. at 80277 (40 C.F.R. § 52.21(b)(41)(ii)(*c*)).[5] Specifically, a source is required to exclude from its calculation "that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions . . . and that are also unrelated to the particular project, including any increased utilization due to product demand growth." *Id.* In extending the use of this exclusion from the utility sector to all sources, EPA ignored its findings in the 1998 NOA that a determination "[v]esting such unrestricted discretion in the regulated entity inevitably leads to enforcement problems." 63 Fed. Reg. at 39861. In particular, the Agency found that "changes to utility units as well as post-change emissions estimates are not

[4] Previously, the actual-to-projected-actual test and demand growth exclusion could only be used by sources in the utility industry. *See* 40 C.F.R. § 52.21(b)(33)(ii).

[5] For ease of reference, throughout this motion, Petitioning States cite to the NSR Rule provisions that revise 40 C.F.R. Part 52. EPA has also included in the NSR Rule parallel revisions to 40 C.F.R. Part 51 for states to incorporate into their implementation plans.

being reported to permitting agencies" and that the existing regulations did not detail "either the means for conducting such verification or the consequences of a source's failure to meet its projected emissions level." *Id.* at 39860-39861.

Furthermore, the Agency found that with respect to non-utilities, "the rulemaking record for NSR reform supports the conclusion that market demand and source modifications are highly intertwined." *Id.* at 39860-39861. Therefore, demand growth is not an independent factor in the determination of whether an emissions increase is attributable to the physical or operational change. *Id.* Not surprisingly, therefore, EPA concluded in 1998 that the demand growth exclusion should not only be limited to utilities, it should be dropped altogether. *Id.*

Despite these strong statements on the record, EPA has now inexplicably reversed course. In the preamble to the NSR Rule, EPA concluded that all major stationary sources will be allowed to apply the demand growth exclusion without any explanation other than a statement that because the modification provision applies only to emission increases that are caused by physical or operational changes, a demand growth exclusion is legally justified. *See* 67 Fed. Reg. at 80203. The Agency failed to address *any* of its findings on the record regarding the lack of enforceability of the demand growth exclusion, and therefore has acted arbitrarily and capriciously. *See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

Second, the NSR Rule requires that sources using the actual-to-projected-actual methodology need only record their emission determinations and provide data to the permitting authority verifying the accuracy of their projections, if the source determines that there is a "reasonable possibility" that the change may lead to a significant emissions increase. 67 Fed. Reg. at 80279 (40 C.F.R. § 52.21(r)(6)). By contrast, the current rule provides accountability by requiring a source to predict emissions from *every* non-routine physical or operational change and supply the permitting agency with these calculations and at least five years' worth of post-change emissions data. *See* 40 C.F.R. § 52.21(b)(23)(v). In addition to the fact that the

new provision grants industry complete discretion whether to report their emission projections, the term "reasonable possibility" is not defined in the rule or even explained in the preamble, and therefore is vague and unenforceable.

The reasonable possibility limitation on a source's obligation to record and report its emission projections is unlawful because EPA cannot promulgate regulations that render statutory requirements unenforceable. In the seminal decision of *Wisconsin Elec. Power Co. v. EPA (WEPCO)*, 893 F.2d 901 (7th Cir. 1990), the court rejected EPA's use of an "actual-to-potential" test to a utility that was already in operation. The court agreed, however, with EPA's position in the case that the Agency "cannot reasonably rely on a utility's own unenforceable estimates of its annual emissions" to determine NSR applicability. *Id.* at 917; *see also Environmental Defense Ctr. v. EPA*, 2003 U.S. App. LEXIS 497 (9th Cir., Jan. 14, 2003) (invalidating EPA "Phase II" storm water regulation that gave to the operator the discretion to decide what reduction in discharges would be the "maximum practical reduction," because "[n]o one will review the operator's decision to make sure that it is reasonable, or even in good faith."). Given the "self-policing" design of the new emissions methodology and EPA's own findings in the rulemaking record regarding industry's failure to "play by the rules" in determining NSR applicability, Petitioning States are likely to succeed in showing that the new emissions methodology is unlawful.

B. The Regulatory Changes Concerning Baseline Emissions, PALs, and "Clean Units" Conflict with this Court's Decision in *Alabama Power v. Costle*.

Petitioning States are also likely to succeed in overturning the revised approach for establishing baseline emissions, the establishment of PALs, and the "clean unit" regulations, which conflict with this Court's interpretation of the term "modification" by allowing for significant emission increases without triggering NSR permitting and pollution control requirements. Because EPA has mandated that each of these provisions be adopted by states, their collective impact will be even larger.

> In interpreting the modification provision in *Alabama Power*, the Court stated: The statutory scheme intends to "grandfather" existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all standards under the PSD program. If these plants increase pollution, they will generally need a permit.

636 F.2d at 400; *see also WEPCO*, 893 F.2d at 908-909 (interpreting "modification" narrowly would frustrate congressional aims to improve air quality and force technology improvements). This Court has held that the modification provision is clear with respect to the scope of polluting activities that are subject to NSR requirements. In *Alabama Power*, the court, in striking down an EPA regulation that exempted any physical or operational change that did not result in a 100-ton increase in emissions, held that "the term 'modification' is nowhere limited to changes exceeding a certain magnitude" and that it was bound to "follow the clear language" of the statute in evaluating EPA's exemption. 636 F.2d at 400; *see also WEPCO*, 893 F.2d at 905 (Congress broadly defined the term "modification" to encompass "the most trivial activities – the replacement of leaking pipes, for example . . . if the change results in an increase in the emissions of the facility."). Although the "[i]mplementation of the statute's definition of 'modification' will undoubtedly prove inconvenient and costly to affected industries . . . the clear language of the statute unavoidably imposes these costs except for *de minimis* increases." *Alabama Power*, 636 F.2d at 400 (emphasis supplied). Because EPA had not justified the exemption on *de minimis* grounds, the exemption could not stand. *Id.*

Likewise in this case, the Agency is required to "give effect to the unambiguously expressed intent of Congress." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). The Agency may permissibly use its limited authority to exempt polluting activities from NSR requirements, but only if those activities will result in *de minimis* emission increases. *Alabama Power*, 636 F.2d at 400. Moreover, EPA may only exempt *de minimis* activities in furtherance of the statutory design, not as a means of frustrating congressional

intent. *Id.*; *see also Environmental Defense Fund v. EPA*, 82 F.3d 451, 466 (D.C. Cir. 1996). As a result, if the NSR Rule exempts polluting activities that cause more than *de minimis* emission increases, the rule must be vacated. *See id.* at 400; *see also Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 485 (2001) ("EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.").

To exercise its limited authority to exempt polluting activities from the modification provision, the Agency must show that the continued regulation of the polluting activities to be exempted would indeed be of trivial value. *Alabama Power*, 636 F.2d at 360-61; *see also Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998) (EPA has a "duty to examine key assumptions as part of its 'burden of promulgating and explaining a nonarbitrary, non-capricious rule'") (citation omitted); *Ober v. Whitman*, 243 F.3d 1190, 1195 (9th Cir. 2001) ("EPA must cite information to explain why it exempted certain sources as *de minimis*, and 'without data . . . we owe no deference to EPA's line-drawing.'") (citation omitted).

Here, the Agency has failed to establish that the regulatory changes for baseline emissions, PALs and "clean units" will exempt activities that result in only *de minimis* emission increases.[6] Indeed, the record below upon which EPA relies indicates that these revisions will lead to significant increases.

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[6] When it promulgated the *de minimis* emission increase levels (e.g., less than 40 tons per year of NOx in an ozone attainment area) in 1980, EPA recognized that *Alabama Power* requires it to justify the *de minimis* levels based on the impact that such emission increases would have on attainment of the existing National Ambient Air Quality Standards (NAAQS). *See* 45 Fed. Reg. at 52707-52708 (August 7, 1980). Now that it is fundamentally changing the methodology for calculating emission increases, EPA cannot rely on these prior justifications for the *de minimis* emission increase levels. Furthermore, to the extent that the calculation of *de minimis* levels were based on the NAAQS existing in 1980, any determination in 2002 regarding *de minimis* emission increases must take account of the NAAQS that have been promulgated or modified since 1980 (e.g., the calculation of a *de minimis* level for NOx must take account of the role of NOx in the creation of ozone and fine particulate matter).

1. EPA's Baseline Emissions Approach Allows Projects that Significantly Increase Emissions to Avoid NSR.

As interpreted by EPA, the statute's modification provision is triggered if emissions resulting from a physical or operational change at a source are predicted to exceed baseline emissions by a threshold amount considered to be "significant" (e.g., 40 tons per year for NOx in an ozone attainment area, *see* 40 C.F.R. § 52.21(b)(23)). The current rule requires that emissions data from the two most recent years be used to calculate the baseline, unless the source can demonstrate to the permitting agency that another two years within the past five are more representative of source operations. 40 C.F.R. § 52.21(b)(21). By contrast, the NSR Rule would allow sources (other than utilities) to predict whether a change will constitute a "modification" by comparing predicted future emissions to a baseline emissions level equal to the average emissions of any two-year period in the past ten. 67 Fed. Reg. at 80278 (40 C.F.R. § 52.21(b)(48)(*d*)(ii)). Sources thus can choose – without oversight from the permitting agency to require that the time period chosen is representative of source operations – their highest two-year period of emissions over the past decade.

To illustrate the impact of the revised baseline approach, assume that an emission unit at a manufacturing facility located in an attainment area for ozone averaged 500 tons of emissions of volatile organic compounds (VOCs) over the last two years. The facility plans to replace a major component of the emission unit, the use of which is projected to increase the unit's emissions by 280 tons annually. Under the current regulations, this change would be considered a "modification," requiring the facility to obtain a PSD permit and install BACT because the projected increase exceeds the significance threshold for VOCs (40 tons per year). The NSR Rule's revised baseline approach, however, would enable this facility to avoid PSD permitting and pollution control requirements if it could identify a two-year span in the last ten years when its previous emissions were large enough to enable it to inflate its baseline, allowing future emission increases to come in under the significance threshold. For example, if the unit emitted

an average of 750 tons during 1995-96, the facility could use the 750-ton amount as its baseline for the unit, and therefore avoid triggering PSD for the change, because emissions would not trigger the 40-ton threshold (the 780 tons of annual emissions anticipated after the change (500 tons + 280 tons)) would be less than the triggering amount of 790 tons (750 tons + 40 tons).[7] Thus, a change anticipated to increase emissions by an amount seven times the threshold level that would trigger review and BACT requirements under the current regulations would neither be reviewed by the permitting authority nor subject to BACT.[8]

All major non-utility sources of air pollution – thousands of facilities nationwide – will have the same incentive to use their "dirtiest years" to establish a baseline in order to avoid triggering NSR for facility expansions. EPA itself has estimated that 20 percent fewer sources would trigger the requirement to obtain a NSR permit as a result of the revised baseline approach.[9] In quantifying the resulting benefits to industry, using the "most conservative" estimate, EPA concluded that every year 118 major sources in nonattainment areas and 64 major sources in attainment areas would evade the significant emission increase threshold as a result of the change in baseline emissions. Final Draft Regulatory and Economic Impact Analysis (April 1, 1996) at 8 (Docket Item No. II-A-18) (attached as Exhibit E).

Despite this predicted result, EPA asserts that it can allow sources to use emissions data from as long as ten years ago because "[t]he Act is silent on the issue of how one is to determine whether a physical or operational change increases the amount of a pollutant for a changed

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[7] As set forth in Point II, *infra*, this hypothetical represents a realistic scenario.

[8] EPA asserts that it has provided an adequate safeguard to the any two-of-ten year baseline by requiring that facilities take into account any current enforceable emission limitations. *See* 67 Fed. Reg. at 80201. However, not all sources have enforceable emission limitations. In addition, as discussed in Point II, *infra*, even if a facility has an emissions limitation, the limitation may nonetheless allow emissions after a physical or operational change to increase substantially, well above *de minimis* levels.

[9] *See* 61 Fed. Reg. at 38319. The draft rule, from which this estimate originates, would have allowed a source to choose any 12-month period of emissions over the past ten years. The final rule requires a source to choose any 24-month period of emissions over this same period.

emissions unit." 67 Fed. Reg. at 80201. EPA cannot, however, lawfully establish a methodology that enables activities that significantly increase pollution to escape the Act's regulatory review and emission control requirements. Such a rule unlawfully circumvents the Court's holding in *Alabama Power* that only *de minimis* activities be able to avoid NSR. *See Alabama Power*, 636 F.2d at 400. EPA has not found, and cannot on this record find, that emission increases that will be allowed to occur under the revised baseline approach are *de minimis*. Furthermore, the Rule also contravenes congressional intent in adopting the modification provision by allowing sources the opportunity to perpetuate the operation of "dirty" plants. *Id.* As a result, Petitioning States are likely to establish on the merits that the revised baseline approach conflicts with the Act.

2. The PAL provisions unlawfully exempt polluting activities that will cause significant emission increases.

Because EPA has included the same flawed baseline emissions approach in the Rule's PAL provisions, *see* 67 Fed. Reg. at 80284 (40 C.F.R. § 52.21(aa)(4)), a facility may avoid NSR permitting and pollution control requirements even though it is allowed to significantly increase emissions up to an artificially high cap. In establishing a PAL for a NSR pollutant, a facility would first determine its emissions baseline as explained above. After determining its emissions baseline, the facility would then be allowed to add an operating margin equal to the "significance level" of the pollutant (e.g., 40 tons for NOx in an ozone attainment area). 67 Fed. Reg. at 80285 (40 C.F.R. § 52.21(aa)(6)). A facility would avoid NSR requirements for the following ten years if it did not exceed the PAL level for the pollutant. *Id.* at 80284 (40 C.F.R. § 52.21(aa)(1)(ii)).

To illustrate, the hypothetical manufacturing facility discussed in Point I.B.1, *infra*, could establish its emissions baseline for VOCs at 750 tons (despite the fact that its average emissions over the past two years was 500 tons). Given the 40-ton significance level for VOCs, the hypothetical manufacturing facility would be able to add 40 tons to its 750 ton baseline, translating into an emissions cap of 790 tons, some 290 tons higher than average emissions over the past two years. In this way, the facility could undertake physical or operational changes that increased its emissions by 58 percent without undergoing NSR. The PAL, with its ten-year duration, would permit the facility to legally emit at that level 790 tons every year for a decade. Such an increase would clearly exceed *de minimis* levels.

In spite of the fact that such an outcome would be allowed without triggering NSR permitting or pollution control obligations, the Agency asserts that its PAL approach is lawful because emissions do not "increase," as defined by EPA. The Agency, cannot, however, lawfully redefine "increase" in such a way that frustrates congressional intent by allowing "dirty" facilities to operate in perpetuity without installing pollution controls. *Alabama Power*, 636 F.2d at 400; *see also Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002) (*Chevron* deference "has important limits: A regulation cannot stand if it is 'arbitrary, capricious, or manifestly contrary to the statute.'") (internal citation omitted). Furthermore, by authorizing a yearly operating margin equal to – not below – the "significance level" (e.g., 40 tons of SO_2), EPA would unlawfully allow a non-*de minimis* emissions increase without requiring the source to obtain an NSR permit or install pollution controls. Petitioning States are therefore likely to show that the PAL provisions of the Rule conflict with the Act.

3. The "clean unit" exclusion is unlawful because it exempts polluting activities that will cause significant emission increases.

As with the revised baseline and PAL approaches, the design of the "clean unit" provisions would allow sources to expand their operations, significantly increasing emissions, yet escape NSR requirements, including the installation of state-of-the-art controls and acquisition of emission offsets. Furthermore, EPA has ignored evidence in the record that technological advances in pollution controls quickly alter what should qualify as "clean."

Under the current regulations, as part of the NSR permitting process, a source must undergo a BACT or LAER analysis for any non-routine physical or operational change (unless the source can demonstrate to the permitting agency that other, contemporaneous remission reductions will enable it to "net out" of the process). *See* 40 C.F.R. § 52.21(i). Pursuant to the "clean unit" exclusion, a source could obtain "clean unit" status – and thus generally be exempt from NSR requirements for any physical or operational changes at the unit – if it had previously installed control technology considered to be "equivalent" to BACT or LAER at the time of

installation (either because the technology had actually gone through BACT or LAER review or because an after-the-fact review deemed the technology "substantially as effective"). See 67 Fed. Reg. at 80279-80284 (40 C.F.R. §§ 52.21(x), (y)). This new form of "grandfathering" would last for ten years. *See id.*

To illustrate what polluting activities could be excluded from NSR, an electric utility that installed "low NOx burners" to control NOx emissions nine years ago may seek to obtain a "clean unit" designation today. The utility would have one year in which to undertake major work on that unit without having to worry about whether BACT or LAER applies for NOx emissions resulting from any physical or operational changes. Being designated as "clean" would not prevent the utility from significantly increasing its emissions over the 40-ton threshold. Likewise, the "safeguard" that the designation would be lost if the utility exceeded its permit limits, *see* 67 Fed. Reg. at 80279, 80281 (40 C.F.R. §§ 52.21(x)(2), (y)(2)), would not preclude significant emission increases.[10]

Furthermore, the "clean unit" exclusion would enable the utility, if located in a nonattainment area, to avoid the statutory requirement that it obtain emission reduction "offsets"

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[10] For example, a utility that has an emission limitation based on its level of pollution per unit of output (e.g., pounds of NOx per million British thermal units, "lbs./mm Btu") could significantly increase NOx emissions in at least three ways. If the unit was currently emitting below its permit limit (e.g., it had a .10 lbs./mm Btu limit for NOx, and averaged emissions of .07 lbs./mm Btu over the past two years), it could undertake a change that would allow the unit to pollute more (e.g., .09 lbs./mm Btu) without undergoing NSR. Such a change could result in emission increases of hundreds of tons on an annual basis, far greater than the current significance thresholds for various criteria pollutants. Next, the facility could perform a change that would increase availability of the unit, by replacing a major boiler component. This could result in significant emission increases due to additional hours of operation. Despite the additional tons of pollution that could result, the "clean unit" status would exempt it from NSR requirements. Finally, the facility could undergo a change, enabling it to increase its capacity. The unit's emission rate (e.g., .07 lbs./mm Btu) could remain constant, but the facility could increase its volume of emissions by generating more energy (and emissions) on an hourly basis.

prior to undertaking the modification, *see* 42 U.S.C. § 7503(c). This offset requirement is independent of the obligation to install LAER; even if a modified source was equipped with LAER, the statute still requires it to obtain offsets, thereby reducing the level of pollution in the nonattainment area. By elevating the obligation to install BACT/LAER over the offset requirement, EPA has eviscerated an important statutory tool for improving air quality.

EPA's assertion that it is a waste of time to require facilities that have implemented pollution controls equivalent to BACT or LAER in the past ten years to undergo NSR for subsequent facility changes, *see* 67 Fed. Reg. at 80229, ignores the evidence in the record that pollution control technology advances rapidly over just a few years. *See, e.g.*, Comments of New York State Department of Environmental Conservation (Dec. 4, 1996) at 2 (Docket Item No. II-D-53) (attached as Exhibit F). Under the current regulations, BACT and LAER determinations triggered by major modifications are made on the basis of currently available information about pollution control technology. Because of recent advances in NOx control technology, BACT or LAER today for the utility described above could well be determined to be selective catalytic reduction (SCR), a control technology that improves NOx reduction significantly over low NOx burners. Under the NSR Rule, however, the utility could avoid NSR on the basis of it having installed pollution controls that are now obsolete.

Because the "clean unit" provisions would exempt activities that could cause more than *de minimis* emission increases from NSR, they exceed EPA's authority under the Act. Petitioning States are, therefore, likely to succeed in their challenge to this aspect of the Rule.

C. The NSR Rule Violates the Clean Air Act's "Anti-Backsliding" Provision.

Petitioning States are also likely to succeed on the merits because the NSR Rule provisions, which EPA has made mandatory "base elements" for inclusion in state implementation plans (SIPs), allow sources in nonattainment areas to "backslide" on more stringent pollution control requirements in contravention of Section 193, the Act's "anti-backsliding" prohibition, 42 U.S.C. § 7515. Section 193 provides in relevant part:

> No control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before November 15, 1990, in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990, in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant. 42 U.S.C. § 7515.[11]

The purpose of Section 193 is to ensure the greatest reductions of emissions in nonattainment areas by prohibiting sources from taking advantage of less stringent limitations than those approved as part of SIPs and in effect prior to the 1990 Amendments unless greater, or at least equivalent, emission reductions are secured at the same time. As the Agency has acknowledged, the Savings Clause "unambiguously requires any relaxations to control requirements or plans in effect prior to enactment of the CAA Amendments of 1990 to be offset by equivalent or greater emission reductions." 64 Fed. Reg. 70652, 70654 (Dec. 17, 1999).

Once the NSR Rule is effective, sources can take advantage of the Rule's relaxation of requirements to implement BACT/LAER pollution controls without otherwise being required to reduce their emissions. Permitting authorities will be forced to implement and apply the relaxed provisions to sources that were subject to the prior, more stringent rule given that the revisions are mandatory SIP elements (unless a state can convince the Agency that its state NNSR program is just as "stringent" as the NSR Rule). For example, each state would be required to adopt a provision that allows sources to obtain a PAL. As described in Point I.B.2, *infra*, a PAL permit would enable a source in a nonattainment area to significantly increase its emissions and yet avoid the requirements to obtain offsets or implement LAER. In violation of Section 193,

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[11]Although "control requirement" is not defined in the Act or in the Code of Federal Regulations, it clearly refers to a limitation on air emissions; EPA has stated that the phrase reflects a term of art and that it "would by its ordinary meaning be a discrete regulation directed at a source of pollution." 56 Fed. Reg. 826, 828 (Jan. 9, 1991). Control requirement has also been referred to, for example, as an emission limitation or regulation since it "commits [sources] to take affirmative, although unspecified steps to achieve the [NAAQ] standard." Coalition Against Columbus Center v. City of New York, 967 F.2d 764, 771 (2d Cir. 1992).

however, the Rule's PAL approach does not require any simultaneous emission reductions to compensate for allowing sources to avoid these requirements.[12] Accordingly, the NSR Rule violates Section 193, and Petitioning States' challenge is likely to succeed on this basis as well.

II. PUBLIC HEALTH, THE ENVIRONMENT, AND STATE PROGRAMS WILL BE IRREPARABLY HARMED IF THE RULE IS NOT STAYED.

The significant emission increases likely to result from the NSR Rule will cause irreparable harm to public health and the environment in Petitioning States, as in other states, if the Court does not stay the Rule. In addition, Petitioning States' environmental agencies will be forced to divert resources away from programs with proven environmental success to implement the regulatory reforms contained in the NSR Rule, the validity of which are at issue here.

A. The NSR Rule Will Irreparably Harm Public Health and the Environment.

Absent a stay, irreparable harm to public health and the environment from the Rule could begin as soon as March 3. Environmental injury, by its nature, may be considered irreparable because it can seldom be adequately redressed by money damages. *Amoco Production Co. v. Gambrell*, 480 U.S. 531, 545 (1987). If such an injury is sufficiently likely, therefore, the balance of harms usually favors the issuance of preliminary relief to protect the environment. *Id.*

As set forth in Point I, *infra*, the NSR Rule will enable major sources of air pollution to undertake projects, significantly increasing emissions, without having to comply with NSR permitting and pollution control requirements. Moreover, even when those compliance obligations are triggered, the unchecked discretion given to sources as part of the revised emission methodology will make it extremely difficult for enforcement agencies to ensure compliance. Even if the Rule is later overturned, it will be impossible to undo the resulting

[12] For the same reason, the revised emissions baseline approach and clean unit exclusion conflict with Section 193.

damage to public health and the environment from these emission increases. *See* Affidavit of Praveen Amar (attached as Exhibit G), ¶ 28. In some cases, old polluting sources may be able to undertake "life extension" projects in the interim, enabling them to perpetuate their grandfathered status in violation of congressional intent.

Emission increases allowed by the NSR Rule cannot be dismissed as a theoretical concern, as demonstrated by a recent example of a modification at an existing major source in New Hampshire. *See* Affidavit of Craig Wright (attached as Exhibit H). The Wright Affidavit shows that, if the NSR Rule's baseline approach had been available when the modification was made, the source could have emitted significantly more pollution, especially SO_2 (almost 650 tons per year more) and NOx (910 tons per year more). *See* Exh. H, ¶¶ 22-24. Under the current rules, pursuant to which the state agency required use of more recent emissions data, the source agreed to accept enforceable emission limitations and chose to install selective catalytic reduction (SCR) pollution control technology, the equivalent of BACT for reducing NOx emissions. *See id.*, ¶ 23. This example from New Hampshire is not an isolated; the revised baseline, PAL, and "clean unit" provisions are likely to cause increased pollution. *See* Exh. G, ¶¶ 17-19, 22-23.

The potential for such harm is substantial. For example, in New Jersey, two automobile manufacturers could use the NSR Rule to establish baseline emissions for VOCs that would be, respectively, 565 tons and 212 tons higher than under the default period of the two most recent years contained in the current regulations. *See* Affidavit of Dr. Iclal Atay (attached as Exhibit I), ¶ 8.[13] In Maine, three pulp and paper mills would be allowed to use emission baselines that

[13] The Atay Affidavit refers to facility-wide emissions data (i.e., not data from individual emission units). Although the determination of whether a physical or operational change is a "major modification" is done by comparing predicted emissions to baseline emissions of the emission unit (not the facility as a whole), variations in the emission baselines of different units would be expected to average out over time.

would permit them to more than triple their SO_2 emissions at certain units from the current default baseline without being subject to NSR. *See* Affidavit of Marc Allen Robert Cone, P.E. (attached as Exhibit J), ¶¶ 6-8. Importantly, two of these facilities had enforceable emission limitations for SO_2 on their emission units, *see id.*, ¶ 5, the "safeguard" EPA claims will prevent significant emission increases. These two units, despite the application of current emission limitations, could have increased their emissions baseline by more than 800 tons compared to a baseline established using the two most recent years. *See id.*, ¶¶ 6, 8.

Not only is the potential for irreparable harm substantial, the threat of such harm is all the more likely because EPA has acknowledged that when sources make changes to improve their operational efficiency, which EPA says will be spurred by the NSR Rule, *see* 67 Fed. Reg. at 80192, they have an economic incentive to utilize the improved unit, in turn increasing overall emissions. As EPA recognized in the draft rule, "it is clear that these major capital investments in industrial equipment are the very types of projects that Congress intended to address in the new source modification provisions." 61 Fed. Reg. at 38262 (citation omitted). Although sources that undertake projects to improve the efficiency of their facilities may reduce their emissions per unit of production, such projects "may dramatically increase source operations." 61 Fed. Reg. at 38262. The net result of such an efficiency project, therefore, could be increased emissions over current levels. *See id.* at 38263. Simply labeling such projects as "efficiency" improvements does not translate into emission reductions.

Emission increases caused by the NSR Rule will adversely affect public health. Increased emissions of NOx and VOCs will worsen ozone problems in the Petitioning States, resulting in increased respiratory illness for their citizens. These impacts will come not just from

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[14] EPA has concluded that numerous upwind sources "contribute significantly" to ozone nonattainment in several of the Petitioning States. *See* 65 Fed. Reg. 2674 (January 18, 2000).

sources in the Petitioning States, but also from those sources located upwind.[14] *See* Exh. G, ¶¶ 24-27; Affidavit of Barbara Kwetz Allen (attached as Exhibit K), ¶ 10. Of particular note, even if Petitioning States with their own state PSD/NNSR programs are able to convince EPA to approve a state-version of the NSR Rule that includes effective safeguards and greater accountability, Petitioning States will still be vulnerable to increased emissions from upwind states that implement the relaxed regulations as promulgated by EPA. These increases will hinder the States' ability to attain the national ambient air quality standards for ozone, a result that could in turn lead to additional hardships. *See* Exh. G, ¶¶ 24-26; Exh. H, ¶ 27; Exh. K, ¶ 10.

NOx and SO_2 also contribute to the formation of particulate matter, which causes respiratory illness and, according to EPA, contributes to the premature death of hundreds or even thousands of people annually. 62 Fed. Reg. 38652, 38656 (July 18, 1997). By allowing substantial emission increases of both pollutants, the NSR Rule will worsen such health problems. A stay is necessary to protect not only public health, but also public resources and the environment. NOx and SO_2 increases associated with the relaxed requirements in the NSR Rule could worsen acid rain in the Petitioning States, causing harm to forests, lakes, and streams. Airborne deposition of nitrogen compounds derived from NOx also leads to the eutrophication of coastal estuaries, such as Long Island Sound. 63 Fed. Reg. at 57477.

B. <u>The Rule Will Heavily Burden State Air Programs and Create Confusion.</u>

Absent a stay, the Petitioning States will be harmed due to the enormous drain of resources on their air programs and regulatory confusion that would result in attempting to implement the NSR Rule during the course of this litigation. Many Petitioning States were caught off guard by EPA's decision to make the elements of the NSR Rule mandatory. This

[14] EPA has concluded that numerous upwind sources "contribute significantly" to ozone nonattainment in several of the Petitioning States. *See* 65 Fed. Reg. 2674 (January 18, 2000).

action represented an abrupt turnaround of the Agency's consistent position, expressed in the draft rule, that states would be given the option to adopt the NSR Rule reforms based on a state's decision of how to best implement the NSR requirements. *See* Affidavit of Carl Johnson (attached hereto as Exhibit L), ¶ 13. Instead of having a choice of incorporating any of the NSR Rule elements into their state programs, Petitioning States are now facing the prospect of having to quickly comprehend and incorporate a complex rule under threat of sanction.

The immediate demand on Petitioning States' resources will be substantial, especially in Massachusetts, New Jersey, New York, and Pennsylvania, where the Rule is scheduled to take effect in less than a month. Petitioning States will likely have to undertake notice-and-comment rulemaking before the Court has determined whether the NSR Rule is a valid exercise of EPA's authority. *See, e.g.*, Exh. L, ¶ 19. This mandate will result in a significant waste of Petitioning States' resources if the Rule is overturned. *See, e.g.*, Exh. H, ¶¶ 12-17; Exh. L, ¶¶ 18-20, 22. Importantly, the States will be forced to divert scarce resources to NSR Rule implementation and away from air programs with proven environmental benefits. *See,* Exh. I, ¶ 7; Exh. L, ¶ 26.

Absent a stay, Petitioning States anticipate a tremendous effort will be necessary to implement the Rule, given its length and complexity. The Rule occupies more than 100 pages in the Federal Register, and is extremely complicated. *See* Exh. H, ¶¶ 12-17; Exh. I, ¶ 7. Although Petitioning States that have EPA-approved PSD and/or NNSR programs have three years to implement the Rule, given the complexity of the Rule, they will not be able to wait until this case is decided to begin expending resources to understand the Rule and prepare SIP revisions. *See* Exh. H, ¶¶ 15-17; Exh. L, ¶ 20. To make matters worse, EPA has failed to define key regulatory provisions in the Rule or provide state regulators with guidance or training regarding how to implement the Rule. *See* Exh. H, ¶¶ 13-14; Exh. L, ¶¶ 16, 21. Also, EPA's failure to adequately analyze the health and environmental impacts of the Rule may force states to do their own analysis in order to comply with state law, further hampering their ability to meet EPA's deadlines. *See* Exh. L, ¶¶ 23-25. Finally, states unable to meet EPA's deadlines are at risk for

severe sanctions, including (1) having the Agency take over PSD permitting by issuing a federal implementation plan (FIP) or revoking the state's authority to implement the federal regulations, and (2) losing federal grant monies and highway funding. *See* Exh. H, ¶ 18; Exh. L, ¶ 27.

Petitioning States respectfully submit that their showing of harm is even greater than for those states in the in the "NOx SIP call" case, *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), in which the Court granted a stay of deadline in an EPA regulation. In the *Michigan* case, several states alleged that a stay was necessary in order to avoid the administrative burden associated with amending their SIPs during merits review. The court granted a partial stay, even though the states' harm showing rested solely on administrative burden. Here, Petitioning States have demonstrated a substantial burden on their air programs, combined with likely harm to public health and the environment. Therefore, a stay is warranted.

III. A BALANCING OF THE HARMS FAVORS THE PETITIONING STATES.

The third factor to be considered in whether to grant a stay is the possibility of harm to other parties if relief is granted. Circuit Rule 18(a)(1). Granting a stay of the NSR Rule merely preserves the status quo, and will not harm other states, EPA, or industry.

A stay is in the interest of other states. Aside from Petitioning States, there are nine states that would be required to implement the NSR Rule on March 3, 2003. These other states will face similar obstacles to implementation (e.g., uncertainty regarding the meaning of important regulatory terms, lack of training, insufficient resources). It is not surprising, therefore, that the associations that represent all state and local air pollution control officials, the State and Territorial Air Pollution Control Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO) have requested a one-year extension of the effective date of the NSR Rule. *See* Letter from L. Eagan and E. Garvey, STAPPA/ALAPCO to Admin. Whitman (Jan. 16, 2003) (attached as Exhibit M).

Neither EPA nor regulated sources will be harmed by the granting of a stay. The current NSR regulations have been in place for more than two decades. The Agency's regulatory

reforms contained in the NSR Rule have been under development for over six years. Even if the NSR Rule was within EPA's legal authority, the Agency has not quantified any environmental benefits from the Rule. *See* Exh. G, ¶ 20.

If the Rule is allowed to take effect on March 3, regulatory confusion will reign, especially in Massachusetts, New Jersey, New York, and Pennsylvania, which implement the federal regulations. This confusion will be detrimental for industry due to permitting delays and enforcement uncertainty.

By contrast, retaining the existing NSR regulations during the litigation would provide regulatory certainty. *See* Exh. H, ¶¶ 30-31. Companies that seek to undertake facility upgrades for energy efficiency or emission reduction purposes will not be harmed by the granting of a stay. Such changes are permissible under current law. As discussed above, an existing stationary source only triggers the Act's "modification" language if the physical or operational change will cause a "significant net emissions increase." *See* 40 C.F.R. § 52.21(b)(2). Electric utilities that predict that a physical or operational change will not lead to a "significant" increase can undertake the change without obtaining a preconstruction permit or installing pollution controls. For non-utilities that currently calculate future emissions using their "potential to emit," these sources may avoid major NSR permitting and pollution control requirements by agreeing to limit their emissions to certain levels. *See* Exh. H, ¶ 20.

IV. A STAY IS IN THE PUBLIC INTEREST.

Courts have recognized that the public interest must be accorded significant weight in determining whether to grant preliminary relief. *See National Ass'n of Farmworkers v. Marshall*, 628 F.2d 604, 616 (D.C. Cir. 1980). As discussed above, the NSR Rule will likely result in increased emissions of air pollutants, to the detriment of human health and the environment. These impacts may well be irreversible. Exh. G, ¶ 28; Exh. H, ¶ 20. Thus, it is the public that will ultimately pay the price for immediate implementation of the Rule, through deteriorating air quality.

In addition, maintaining the status quo – in the form of a regulatory program that has been in place for more than two decades – also would further the public interest. States could continue to process permits under a well-established program and the regulated community would not be subject to the uncertainties that will arise if they receive permits or undertake facility changes under provisions of the Rule that are later invalidated by the Court. The NSR Rule has generated much controversy due to several features – including the Agency's failure to analyze the health impacts of the regulatory reforms and its last-minute decision to make the relaxed regulations mandatory for the states – that deserve careful review by the Court before states are forced to expend significant resources implementing the Rule. Especially in these times of fiscal crisis for many states, good government and public policy demand that taxpayer dollars not be ill spent. As a result, a stay is in the public interest.

CONCLUSION

For the reasons set forth above, Petitioning States respectfully request that the Court grant their motion for a stay of the NSR Rule during the pendency of the litigation. A stay will prevent the immediate harm to public health, the environment, and Petitioning States' air programs. Continuing the status quo while the Court considers the parties' arguments on the legality of the Rule merits furthers the interest of the states, the public, and the regulated community. Under these circumstances, Petitioning States believe that an expedited appeal of this matter will not be necessary if a stay is granted.

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Respectfully submitted,

FOR THE STATE OF NEW YORK

ELIOT SPITZER
Attorney General

CAITLIN HALLIGAN
Solicitor General

By:

_____

PETER LEHNER
J. JARED SNYDER
MICHAEL J. MYERS
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, New York 12224
(518) 402-2594

FOR THE STATE OF CONNECTICUT

RICHARD BLUMENTHAL
Attorney General

By:

_____

KIMBERLY MASSICOTTE
MARK KINDALL
Assistant Attorneys General
P.O. Box 120
55 Elm Street
Hartford, CT 06141-0120
Tel: (860) 808-5250

FOR THE STATE OF MAINE

G. STEVEN ROWE
Attorney General

By: _____
GERALD D. REID
Assistant Attorney General
Department of the Attorney General
State House Station #6
Augusta, Maine 04333-0006
(207) 626-8800

FOR THE STATE OF MARYLAND

J. JOSEPH CURRAN, JR.
Attorney General

By: _____
KATHY M. KINSEY
Assistant Attorneys General
Office of the Attorney General
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, MD 21230
(410) 537-3954

FOR THE COMMONWEALTH OF
MASSACHUSETTS

THOMAS F. REILLY
Attorney General

By: _____
JAMES R. MILKEY
WILLIAM L. PARDEE
FREDERICK D. AUGENSTERN
Assistant Attorneys General
Environmental Protection Division
200 Portland Street, 3rd Floor
Boston, Massachusetts 02114
(617) 727-2200 Ext. 3353

FOR THE STATE OF NEW HAMPSHIRE

STEPHEN J. JUDGE
Acting Attorney General

By:

_____

MAUREEN D. SMITH
Senior Assistant Attorney General
Office of the Attorney General
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3679

FOR THE STATE OF NEW JERSEY

DAVID SAMSON
Attorney General

By:

_____

STEFANIE BRAND
KEVIN AUERBACHER
JEAN REILLY
RUTH MUSETTO
Deputy Attorneys General
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 093
Trenton, New Jersey 08625-4503
(609) 984-6640

FOR THE COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION

MICHAEL P. BEDRIN
CHIEF COUNSEL

By:

_____
Robert A. Reilly, Assistant Counsel
Richard P. Mather, Sr., Bureau Director
The Rachel Carson State Office Building
P.O. Box 8464
Harrisburg, Pennsylvania 17105
(717) 787-0478

FOR THE STATE OF RHODE ISLAND

PATRICK C. LYNCH
Attorney General

By:

_____
TRICIA K. JEDELE
Special Assistant Attorney General
Department of Attorney General
150 South Main Street
Providence, Rhode Island
401-274-4400 ext. 240

FOR THE STATE OF VERMONT

WILLIAM H. SORRELL
Attorney General

By:

_____
ERICK TITRUD
Assistant Attorney General
KEVIN LESKE
Special Assistant Attorney General
Office of the Attorney General

109 State Street
Montpelier, VT 05609-1001
(802) 828-3186